



On May 11, 1993 the employee filed a claim for a schedule award. On June 21, 1993 the Office issued a schedule award for a 15 percent impairment of his right lower extremity. The period of the award ran through March 2, 1994.

On November 9, 1996 the employee filed a claim for an increased schedule award. On December 31, 1996 the Office issued a schedule award for an additional 5 percent impairment of his right lower extremity, for a total impairment of 20 percent. The period of the award ran through February 19, 1997.

The employee underwent a total right knee replacement on September 14, 1998. He underwent a revision of the right knee with patella resurfacing and a biconvex patella component on November 1, 2001.

On January 18, 2008 the employee's representative informed the Office that the employee had passed away. The death certificate gave January 13, 2008 as the date of death. The immediate cause was complications of cirrhosis of the liver.

On January 26, 2009 the employee's representative, now appellant's representative, submitted a December 31, 2008 medical report to the Office in support of a request for an increased schedule award: "As you can see, Dr. Weiss identifies 37 percent impairment to the right lower extremity as a result of a good result from a total knee replacement. I do ask kindly for an additional 17 percent impairment to the right lower extremity."

In a decision dated February 9, 2009, the Office denied appellant's claim on the grounds that the employee made no request for an increased schedule award prior to his death on January 13, 2008. On August 6, 2009 an Office hearing representative affirmed. The hearing representative explained that a claim for a schedule award was made during the employee's lifetime, but the issue was decided in previous decisions and was no longer under development. Because the Office received no further claim for an increased award before the employee's death, there was no entitlement to such an award.

On appeal, appellant's representative argues that posthumous schedule awards are permitted under 5 U.S.C. § 8109(a). He argues that the employee did make a valid claim for a schedule award during his lifetime. Counsel adds that appellant has submitted substantial medical evidence to establish a 17 percent increase in the award previously paid.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.<sup>1</sup> Such loss or loss of use is known as permanent impairment.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8107.

<sup>2</sup> 20 C.F.R. § 10.404.

Section 8109(a) of the Act provides that, if an individual has sustained disability compensable under section 8107(a), has filed a valid claim in his lifetime, and dies from a cause other than the injury before the end of the period specified by the schedule, the compensation specified by the schedule that is unpaid at his death, whether or not accrued or due at his death, shall be paid, under an award made before or after the death and for the period specified by the schedule, to designated surviving beneficiaries.<sup>3</sup>

The Board has held that the intent of the statutory language is clear: for a beneficiary to be entitled to payment of a schedule award upon the death of an injured employee, such claim must have been filed within the employee's lifetime.<sup>4</sup> If an injured employee or someone acting on the employee's behalf does not file a claim before the employee's death, the right to claim compensation for disability other than medical expenses does not survive.<sup>5</sup>

A posthumous claim may be made by the estate or a survivor of a deceased employee for medical benefits only. A posthumous disability claim cannot be accepted.<sup>6</sup>

### ANALYSIS

On January 26, 2009 appellant, through her representative, made a posthumous claim for an increased schedule award. The Act does not permit such claims. The Board has held that a plain reading of section 8109(a) makes clear that an injured employee or someone on his behalf must file a claim during the employee's lifetime to establish a valid claim for a schedule award.<sup>7</sup> Appellant's representative does not argue, and the evidence does not support, that the employee filed a valid claim for an increased schedule award following the 20 percent rating previously awarded. Accordingly, the right to initiate a claim for compensation for an alleged increase did not survive the employee's death. Appellant's posthumous claim is invalid. The Board will therefore affirm the Office's August 6, 2009 decision affirming the denial of her posthumous claim.

On appeal, appellant's representative argues that posthumous schedule awards are permitted under section 8109(a). This is true provided certain conditions are met, such as the filing of a valid claim in the employee's lifetime. One must distinguish the posthumous payment of a schedule award under section 8109 from a posthumous claim for a schedule award. There is no provision for a posthumous claim. For this reason, the Board holds that appellant's claim is invalid.

Appellant's representative counters that the employee filed a valid claim for a schedule award during his lifetime. Indeed, on May 11, 1993 the employee filed an initial claim for a

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<sup>3</sup> 5 U.S.C. § 8109(a).

<sup>4</sup> *Carol T. Collins (Harold Turner)*, 54 ECAB 417 (2003).

<sup>5</sup> 20 C.F.R. § 10.105(d).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.0801.8(d) (March 1993).

<sup>7</sup> *Mary Marie Young (David E. Young)*, 30 ECAB 94 (1978).

schedule award, and on November 9, 1996 he filed a claim for an increased schedule award. However, section 8109(a) addresses any scheduled compensation “that is unpaid at his death.” In this case, there was no unpaid compensation under either of the previous schedule award claims. The Office accepted those claims and fully paid the employee all the compensation that was specified by the schedule. Neither claim was under development at the time of death.<sup>8</sup>

So the wording of section 8109(a)(2) -- “has filed a valid claim in his lifetime” -- cannot refer to the employee’s May 11, 1993 or November 9, 1996 claims as both had been paid. It necessarily refers to a schedule award claim filed in the employee’s lifetime that was unpaid at the time of his death or still under development. The record shows no such claim. Appellant may have submitted substantial medical evidence to establish a 17 percent increase in the employee’s permanent impairment, but without a valid claim for such filed in the employee’s lifetime, there can be no entitlement to additional benefits under section 8109.

### CONCLUSION

The Board finds that appellant may not make a posthumous claim for a schedule award.

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<sup>8</sup> See *Sue Howard (Jimmie L. Howard)*, 55 ECAB 715 (2004) (where the employee died after requesting an oral hearing on the issue of the percentage impairment awarded, the Board found that the Office improperly denied appellant’s right to contest the schedule award and pursue the employee’s claim for a revised award); *Cheryl R. Holloway (Wryland R. Holloway)*, 54 ECAB 443 (2003) (initial claim under development at the time of death); *M.D. (C.D.)*, Docket No. 06-1010 (issued November 3, 2006) (where the employee filed a claim for an increased schedule award and the case was remanded for further development of the issue in 1974, but the Office never issued a final decision in the matter and the issue remained unresolved, the Board held there was a pending claim for an increased schedule award during the employee’s lifetime and that there was no provision in section 8109 precluding appellant from pursuing the issue on behalf of the employee’s estate).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 6, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2010  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board